

ORIGINAL

FILED

September 14 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP,)
a Montana limited partnership;)
PLAINS GRAINS INC., a Montana corporation;)
ROBERT E. LASSILA and EARLYNE A.)
LASSILA; KEVIN D. LASSILA and)
STEFFANI J. LASSILA; KERRY ANN)
(LASSILA) FRASER; DARYL E. LASSILA)
and LINDA K. LASSILA; DOROTHY LASSILA;)
DAN LASSILA; NANCY LASSILA)
BIRTWISTLE; CHRISTOPHER LASSILA;)
JOSEPH W. KANTOLA and MYRNA R.)
KANTOLA; KENT HOLTZ; HOTLZ FARMS,)
INC., a Montana corporation; MEADOWLARK)
FARMS, a Montana partnership; JON C.)
KANTOROWICZ and CHARLOTTE)
KANTOROWICZ; JAMES FELDMAN and)
COURTNEY FELDMAN; DAVID P. ROEHM)
and CLAIRE M. ROEHM; DENNIS N. WARD)
and LaLONNIE WARD; JANNY KINION-MAY;)
C LAZY J RANCH; CHARLES BUMGARNER)
and KARLA BUMGARNER; CARL W.)
MEHMKE and MARTHA MEHMKE; WALTER)
MEHMKE and ROBIN MEHMKE; LOUISIANA)
LAND & LIVESTOCK, LLC., a limited liability)
corporation; GWIN FAMILY TRUST,)
U/A DATED SEPTEMBER 20, 1991;)
FORDER LAND & CATTLE CO.; WAYNE W.)
FORDER and DOROTHY FORDER;)
CONN FORDER and JEANINE FORDER;)
ROBERT E. VIHINEN and PENNIE VIHINEN;)
VIOLET VIHINEN; ROBERT E. VIHINEN,)
TRUSTEE OF ELMER VIHINEN TRUST;)
JAYBE D. FLOYD and MICHAEL E. LUCKETT,)
TRUSTEES OF THE JAYBE D. FLOYD LIVING)
TRUST; ROBERT M. COLEMAN and HELEN)
A. COLEMAN; GARY OWEN and KAY OWEN;)
RICHARD W. DOHRMAN and ADELE B.)
DOHRMAN; CHARLES CHRISTENSEN)
and YULIYA CHRISTENSEN; WALKER)
S. SMITH, JR. and TAMMIE LYNNE SMITH;)
MICHAEL E. HOY; JEROME R. THILL; and)

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MONTANA ENVIRONMENTAL)
 INFORMATION CENTER, a Montana)
 nonprofit public benefit corporation,)
)
 Appellants,)
)
 vs.)
)
 BOARD OF COUNTY COMMISSIONERS OF)
 CASCADE COUNTY, the governing body of)
 the County of Cascade, acting by and through)
 Peggy S. Beltrone, Lance Olson and)
 Joe Briggs,)
)
 Appellees.)
)
 and)
)
 SOUTHERN MONTANA ELECTRIC)
 GENERATION and TRANSMISSION)
 COOPERATIVE, INC.; the ESTATE OF)
 DUANE L URQUHART; MARY URQUHART;)
 SCOTT URQUHART; and LINDA URQUHART,)
)
 Appellees/Cross-Appellants.)

NOTICE OF UNTIMELY CONSTITUTIONAL CHALLENGE

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THE NOTICE OF CONSTITUTIONAL CHALLENGE BY APPELLANTS IS UNTIMELY

Rule 27, M.R.App.P. requires that any party raising a constitutional challenge "...must give notice to the Supreme Court and to the Montana Attorney General of the existence of the constitutional issue. This notice must be in writing, specify the section of the Montana Code Annotated or chapter of the session law to be construed **and must be given no later than eleven days from the date that the notice of appeal or notice of cross appeal is filed or the date of the filing of an original proceeding in the Supreme Court.**"

The Notice of Constitutional Question was filed by Plains Grains well beyond eleven days from the date of the Notice of Appeal (dated May 29, 2009 and was filed on June 1, 2009) as well as well beyond eleven days from the date of the Notice of Cross

Appeal (dated June 10, 2009 and was filed on June 11, 2009). The Notice of Cross Appeal gave notice to Plains Grains that Southern Montana and the Urquharts were cross appealing from the decision of the district court on the issue of denial of the Motion to Dismiss on the grounds of mootness. The district court raised in its written decision, *sua sponte*, a constitutional argument that requiring a bond to stay a decision may interfere with constitutional rights. Plains Grains had actual knowledge of the constitutional issue raised by the district court and of the cross appeal of the district court's ruling and failed to give timely notice of the constitutional challenge. This Court has previously ruled that the failure to properly give the notice challenging the constitutionality precluded this Court from reaching the constitutional challenge. ***Haider v. Frances Mahon Deaconess Hospital***, 2008 MT 32, 298 Mont. 203, 994 P.2d 1121. Also see: ***Boettcher v. Montana Guaranty Fund***, 2006 MT 127, 332 Mont. 279, 140 P.3d 474.

Even though the constitutional issue was mentioned by the district court in its decision and order¹, assuming, *arguendo*, that the time for giving notice was triggered by the filing of the Motion to Dismiss on August 25, 2009, the Notice of Constitutional Question is still untimely, falling outside the eleven days under Rule 27.

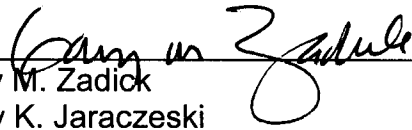
CONCLUSION

Therefore, the Notice of Constitutional Question, being untimely, the Court should not address any constitutional challenge raised by Plains Grains.

¹ Plains Grains never filed a motion for stay and there was never any hearing on the requirement of posting a bond. The issue of a bond was not even before the district court.

DATED this 11 day of September, 2009.

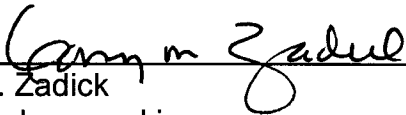
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Times New Roman test typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is not more than 1250 words, excluding certificate of service and certificate of compliance.

DATED this 11 day of September, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

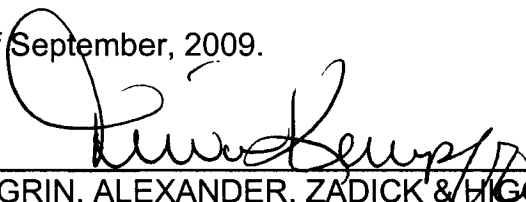
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